No. 83-1437

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JEFFREY MAREK, THOMAS WADYCKI and LAWRENCE RHODE,

Petitioners,

—v.—

ALFRED W. CHESNY, INDIVIDUALLY, AND AS ADMINISTRATOR OF THE ESTATE OF STEVEN CHESNY, DECEASED,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF BY THE COMMITTEE ON THE FEDERAL COURTS ON BEHALF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS AMICUS CURIAE SUPPORTING RESPONDENT

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Preliminary Statement

This brief is respectfully submitted by the Committee on the Federal Courts of the Association of the Bar of the City of New York (the "Association"), on behalf of the Association as *amicus curiae*, in support of affirmance of the Court of Appeals' decision below. The Association believes that the Court of Appeals correctly held that the mandatory "costs"-shifting provision of Rule 68, Fed. R. Civ. P., was not intended to deprive the District Courts of their discretion to determine the amount of a reasonable attorneys' fee under The Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. (Supp. V) § 1988 ("Section 1988").

Interest of the *Amicus*

The Association was established in 1871 "for the purposes of cultivating the science of jurisprudence, promoting reforms in the law, facilitating the administration of justice, [and] elevating the standard of integrity, honor and courtesy in the legal profession. . . ." (Charter, April 28, 1871). The Committee on the Federal Courts is one of the Association's standing committees. It monitors developments affecting the administration of the federal courts and develops proposals for improvements.

The Committee has recently studied Rule 68 in reviewing amendments to it proposed by the Committee on Rules of Practice and Procedure. 98 F.R.D. 339, 361-67 (1983). Those proposals would change Rule 68 by, among other things, empowering the District Courts to award attorneys' fees as well as "costs" against a litigant or defendant who rejects an offer of settlement which proves superior to the ultimate judgment. Because the power to shift fees—rather than only "costs," as at present—would substantially raise the "stakes" under Rule 68, the proposal would also eliminate the mandatory character of the present Rule; fee-shifting would be subject to consideration of various discretionary factors, to avoid what the Advisory Committee called "the Draconian impact of an 'all-or-nothing' rule." *Id.* at 365.

The Association's review of the Advisory Committee proposals gave it an opportunity to study in depth a number of the Rule 68 issues raised by the First Question Presented in the petition herein.[1] The Association believes that its views may be helpful to the Court in resolving those Rule 68 issues, and this brief is being filed with the consent of the parties.[2]

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1 This brief does not address, and the Association does not take a position with respect to, the Second Question Presented by the petitioners.

2 The parties' letters of consent to the filing of this brief have been filed with the Clerk of this Court.

Statement of Facts[3]

Petitioners Marek, Wadycki and Rhode, police officers in the Village of Berkley, Illinois, shot and killed respondent's son, Steven. Respondent brought this action against the policemen, the Village, and others, under 42 U.S.C. § 1983.

Thereafter petitioners submitted an offer of judgment which offered to settle three elements of the case: liability, "costs" and attorneys' fees. The offer read:

> Pursuant to Federal Rule of Civil Procedure 68, the defendants [Marek, Wadycki and Rhode] hereby offer to allow judgment to be taken against them by the plaintiff for a sum, including costs now accrued and attorneys' fees, of One Hundred Thousand ($100,000) Dollars.

Respondent rejected the offer. The record does not reflect the reasons for respondent's rejection. There has been no judicial determination as to the reasons why the offer was rejected.

After a three-week trial, the jury returned a verdict for respondent. The jury awarded compensatory damages and punitive damages against the police officer defendants. The total amount of the verdict was $60,000, the jury having decided not to award any amount as compensation for loss of the decedent's future earnings, notwithstanding uncontradicted expert testimony that he would have left his parents an estate having a present value in excess of $500,000.

Pursuant to Section 1988, the District Court awarded respondent attorneys' fees of $32,000, for legal services rendered prior to the offer of judgment. The District Court refused to consider any award of fees for services rendered after the date of the Rule 68 offer. The District Court held that Rule 68's requirement that respondent pay all "costs" incurred subsequent to rejection of the offer precluded the award of attor-

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3 This Statement of Facts is based on the record and on the decisions below. They are reported at 547 F. Supp. 542 (N.D. Ill. 1982) and 720 F.2d 474 (7th Cir. 1983).

neys' fees to which respondent might otherwise have been entitled under Section 1988.[4]

The Court of Appeals for the Seventh Circuit reversed, holding that Rule 68 did not preclude an award of fees otherwise appropriate. It ordered the case remanded to the District Court for determination under Section 1988 of a reasonable fee for services rendered after the Rule 68 offer.[5]

The Court of Appeals reasoned that Rule 68 is not intended to cut off the possibility of a Section 1988 fee award. Relying upon this Court's recent decision in *Roadway Express Inc. v. Piper*, 447 U.S. 752 (1980), the Court of Appeals held that proper construction of the word "costs" depends upon the context in which the word is used.[6] With reference to the

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4 Section 1988 provides, in pertinent part:

> In any action or proceeding to enforce a provision of Section 1981, 1982, 1983, 1985 and 1986 of this Title, Title 9 of Public Law 92-318, or Title 6 of the Civil Rights Act of 1964, the Court in its discretion may allow the prevailing party, other than the United States, a reasonable attorneys' fee as part of the costs.

5 A threshold issue considered by the Court of Appeals was whether petitioners' offer of judgment for a liquidated sum, "including costs now accrued and attorneys' fees," was valid under Rule 68. The Court of Appeals concluded that the form of petitioners' offer was proper. The issue of the validity of the offer is not raised in the petition for certiorari. However, it may be noted that the language of the offer was directly at odds with the position petitioners now take, that "costs" includes attorneys' fees: the offer separated those two items out and treated them as if fees were *not* included in "costs." See page 3, *supra*.

6 The Court of Appeals distinguished the decision of the Court of Appeals for the Sixth Circuit in *Fulps v. City of Springfield*, 715 F.2d 1088 (6th Cir. 1983). *Fulps* did not involve the issue presented here, whether a plaintiff who rejects a Rule 68 offer is barred from receiving any award for fees incurred after rejection of the offer. In *Fulps*, plaintiff had *accepted* the offer of judgment which, unlike petitioners' here, was silent on the subject of fees. The Court of Appeals for the Sixth Circuit held that the acceptance of the offer did not preclude a further application for fees by the plaintiff. Some of its reasoning towards this conclusion is contrary to that of the Court of Appeals below.

particular context in which "costs" must be construed here, the Court of Appeals reasoned that allowing the automatic, mandatory "costs"-shifting provisions of Rule 68 to be used to preclude a fee award under Section 1988 would be inconsistent with the Congressional policy underlying Section 1988, which grants the District Courts broad discretion over fee awards. The Court also noted that, if Rule 68 were construed to produce a result which would differ from that produced by Section 1988, a question of the Rule's validity might arise under the Rules Enabling Act, 28 U.S.C. § 2072.

Thereafter, before any further proceedings could be had in the District Court under Section 1988, petitioners sought review of the Rule 68 issue in this Court.

Summary of Argument

I. A. The Court of Appeals correctly held that "costs" in Rule 68 is limited to the items traditionally taxable by the clerk of the court under Rule 54(d), Fed. R. Civ. P. As this Court made clear in *Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1981), Rule 68 deters rejection of settlement offers by denial of Rule 54(d) "costs" to a prevailing plaintiff. "Costs" in Rules 54(d) and 68 was not meant to be construed one way if a fee award statute is involved and another way if one is not. The Rules themselves make no such distinction and the Federal Rules should be construed uniformly as to "*every* civil action." Fed. R. Civ. P. 1.

This Court's recent decision in *Roadway Express Inc. v. Piper*, 447 U.S. 752 (1980), precludes subjecting lawyers in different areas of practice to differing sanctions for dilatory conduct. *Id.* at 763. This would be the result of a reversal here: rejection of a settlement offer in a commercial case would result in the relatively modest sanction of denial of Rule 54(d) costs, while similar rejection in a civil rights action would result in a Draconian forfeiture of fees. Compare *id.* at 762-63.

Petitioners (and the Government as *amicus curiae*) confuse two different issues: whether Rule 68 precludes any award of fees after rejection of a Rule 68 offer and, on the other hand,

whether Section 1988 permits a District Court to diminish a fee award for services rendered after a reasonable settlement offer has been rejected in bad faith. These are two entirely different questions, analytically and practically. *Delta Air Lines* teaches that Rule 68 involves no concept of "reasonableness" or "good faith"—if a defendant's settlement offer was more than the plaintiff's verdict, the plaintiff must bear the costs, while if his offer turns out to be less, the defendant must bear the costs.

Thus petitioners' (and the Government's) repeated references to the need to encourage "good faith" consideration of "reasonable" settlement offers are really arguments that bad faith rejection of a reasonable settlement offer should be a factor which the District Courts may consider *under Section 1988* in deciding on the amount of a reasonable fee. However, that question is not presented on the present record in this Court. As noted above, the District Court never considered the matter under Section 1988, having ruled that Rule 68 precluded any consideration of an award of post-offer fees.

The wording of Section 1988 was not intended to change the operation of Rule 68. The legislative history of Section 1988 makes it clear where the phrase "as part of the costs" comes from: Congress simply "tracked" the language of earlier civil rights fee award statutes. It adopted the language to promote uniformity among the civil rights statutes and, as this Court explained in *Hutto v. Finney*, 437 U.S. 678 (1978), to assure that attorneys' fees could be recovered against a state notwithstanding the Eleventh Amendment. There is no indication in the history of Section 1988 that it was intended to define "costs" for purposes of Rules 54(d) and 68.

B. The existence of numerous other fee award statutes, some worded like Section 1988, some worded differently, confirms that "costs" in Rules 54(d) and 68 cannot be construed by reference to such statutes. In enacting fee-award statutes, Congress' practice has been sometimes to describe attorneys' fees as "costs" in fee award statutes, sometimes not to do so, sometimes to use different such formulations even in a single statute, and sometimes to use language which omits the

word "costs" altogether—all according to no consistent pattern. Thus attorneys' fees are said to be "part of the costs" under Section 1988, but not, for example, under the Fair Housing Act, Title VIII, Civil Rights Act of 1968, 42 U.S.C. § 3612(c). Petitioners have suggested no reason why fees should be at risk under Section 1988 but not under the latter statute (and dozens of others which are similarly worded).

Adoption of petitioners' proposed construction of Rule 68 would lead to untenable distinctions between and among cases arising under the numerous fee award statutes. It would contravene basic principles of statutory construction to read Rule 68 as producing such "untenable distinctions." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982).

Petitioners (and the Government) miss the point by their emphasis upon those statutes which (like Section 1988) are worded to authorize a fee award "as part of the costs." To sustain their proposed construction of Rule 68, they would have to show that Congress had some reason to *distinguish* between, for example, the Fair Housing Act, 42 U.S.C. § 3612(c) and Section 1988, and to punish non-settling plaintiffs in Section 1988 cases far more severely than non-settling plaintiffs in cases under the Fair Housing Act or the numerous other statutes which are worded to allow an award of fees *in addition to* costs. They have made no such showing. It defies common sense that Congress had any such intention.

C. The recent Advisory Committee proposals to amend Rule 68 underscore how inappropriate it would be to single out cases under Section 1988 (and similarly-worded fee award statutes) for the application of present Rule 68 in the manner contended for by petitioners (and the Government). The Advisory Committee proposals seek to increase materially the incentives for settlement by using fee-shifting as a punishment for rejection of a settlement offer. But the Advisory Committee would do so only after supplying safeguards absent from the present Rule and, under *Delta Air Lines*, not to be implied into it.

Thus, even advocates of these proposals recognize that the present Rule cannot fairly be used to change the incidence of attorneys' fees. This should be no less true in cases where a reasonable fee award would otherwise be appropriate than in cases not arising under a fee award statute.

D. Finally, a construction of the Federal Rules which precluded an award of fees under Section 1988 and similarly worded statutes would raise the most serious questions under the Rules Enabling Act, 28 U.S.C. § 2072. The Court of Appeals below was correct in construing Rule 68 to avoid such questions.

II. The Court of Appeals also correctly held that the District Courts' discretion under Section 1988 was not intended to be ousted by Rule 68. The legislative history of Section 1988 makes clear that the District Courts were entrusted with broad discretion to award reasonable fees, and contains no indication that the mandatory "costs"-shifting provisions of Rule 68 were intended to deprive them of that discretion.

This point goes only to the proper construction of Rule 68. It may be that under Section 1988 or other particular fee award statutes, a court can properly consider bad faith rejection of a reasonable settlement offer in deciding what is a "reasonable fee." But that result cannot be reached by applying the mechanical cut-off of "costs" effected by Rule 68, and that issue cannot be resolved on the record in this case, where no determination under Section 1988 was ever made by the District Court.

Argument

Point I

THE WORD "COSTS" IN RULE 68 IS INTENDED TO BE CONSTRUED UNIFORMLY TO ENCOMPASS ONLY THOSE ITEMS TAXABLE AS COSTS IN ALL CIVIL ACTIONS

A. The language and purpose of Rule 68 establish that the term "costs" was intended to encompass only those items traditionally taxable as costs by the clerk of the court under Rule 54(d).

Rule 68 provides that if a defending party makes an offer of judgment that is refused, and the plaintiff thereafter obtains a judgment "not more favorable than the offer," the plaintiff must pay post-offer costs.[7] The Rule is automatic and me-

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7 Rule 68: Offer of Judgment.

> At any time more than 10 days before the trial begins, the party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within ten days after service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than ten days prior to the commencement of hearings to determine the amount or extent of liability.

The Rule has been amended only twice in its 46-year history, and remains largely unchanged from its original form. See 7 J. Moore, *Moore's Federal Practice*, ¶ 68.01 (2d ed. 1983 & Supp. 1984).

chanical in its operation; it looks solely to the respective amounts of the offer and the verdict. If the offer exceeds the verdict, the plaintiff "*must* pay the costs incurred after the making of the offer." Although the Advisory Committee's brief note to the Rule contains no express statement of its purpose, Rule 68 has been understood to encourage plaintiffs to accept settlement by supplying a modest deterrent to rejections of a defendant's offer. *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 352 (1981).

In *Delta Air Lines*, this Court's first consideration of Rule 68 since its adoption in 1938, this Court made several rulings which are of importance to the present case. First, this Court held that Rule 68 must be construed *in pari materia* with Rule 54(d), Fed. R. Civ. P., and indeed that failure so to construe it would be "to attribute a schizophrenic intent to the drafters." *Id.* at 353-56. This Court stated that Rule 68 was intended to "alter the Rule 54(d) presumption" that a prevailing party recovers the "costs" referred to in Rule 54(d). *Id.* at 351. It was in part based on this holding that this Court concluded that the Rule denies "costs" only where the plaintiff recovers a judgment and has no application where the plaintiff recovers nothing. *Id.* at 354-55.

Second, this Court held that Rule 68 did not contain "a reasonableness requirement." The lower court decision reversed by this Court had held that "only reasonable offers trigger the operation of Rule 68." This Court rejected that interpretation, and declined to "read a reasonableness requirement into the Rule." *Id.* at 355.

In sum, this Court stated that the purpose of Rule 68 is the relatively narrow one of "provid[ing] an additional inducement to settle in those cases in which there is a strong probability that plaintiff will obtain a judgment but the amount of recovery is uncertain." *Id.* at 352.[8] The particular "additional

8 This Court's reference to "an *additional* inducement" reflected its recognition of the fact that, "In all litigation, the adverse consequences of potential defeat provide both parties with an incentive to settle in advance of trial." *Delta Air Lines*, 450 U.S. at 352.

inducement" which Rule 68 supplies is the relatively narrow one of depriving the plaintiff of Rule 54(d) costs.

It is clear from the language and structure of Rules 54(d) and 68 that the "costs" to which they refer do not include attorneys' fees in cases arising under the fee award statutes.[9] Rule 54(d) provides that costs may be taxed by the clerk of the court on one day's notice. This provision clearly refers to "costs" of the sort specified in 28 U.S.C. § 1920—routine, readily determinable charges which it would be appropriate to leave to a clerk, and as to which a single day's notice of settlement is appropriate.[10] The conclusion that "costs" refers only to charges taxable by a clerk is confirmed by the fact that when particular Federal Rules are meant to provide for attorneys' fees as expenses, the inclusion is explicit and the authority to award fees is expressly granted to the *Court*, not the clerk. See Rules 11, 16(f), 26(g), 30(g), 37, Fed. R. Civ. P.[11] The Court of Appeals correctly adopted a construction of "costs" which respects this clear, consistent usage in the Federal Rules. It correctly rejected a proposed construction which, because of the interrelation of Rules 68 and 54(d) explained in this Court's *Delta Air Lines* decision, would lead to the result that the

9 This Court has expressly reserved the question whether "costs" in Rule 54(d) incorporates Section 1988. *White v. New Hampshire Department of Employment Security*, 455 U.S. 445, 454-55 n.17 (1982). That question must be decided here. It should be decided against such incorporation.

10 In applying Rule 54(d), the lower Federal Courts have consistently used the particular fees and other items listed in § 1920 as the definition of the term. *See, e.g., White v. New Hampshire Dep't of Employment Security*, 629 F.2d 697, 701-03 (1st Cir. 1980), *rev'd on other grounds*, 455 U.S. 445 (1982); *Dodwell v. City of Apopka*, 698 F.2d 1181, 1188-89 & n.12 (11th. Cir. 1983). This reliance on § 1920 is consistent with the "uniform structure established by the 1853 Act" which adopted § 1920. *Roadway Express*, 447 U.S. at 761.

11 These rules all involve sanctions for deliberate misconduct, and are penal in nature. By contrast, Rule 68, although designed to encourage settlement and avoid the needless expense of a trial, does not apply only where misconduct or bad faith has been shown.

Clerk of the Court could rule on fee applications on one day's notice.

As the Court of Appeals correctly stated, this Court's recent decision in *Roadway Express Inc. v. Piper*, 447 U.S. 759 (1980), strongly supports the decision below. In *Roadway Express* this Court was faced with determining Congress' intent in enacting 28 U.S.C. § 1927 which also uses the term "costs" without further definition. There, too, petitioner contended that "costs" should be read to include attorneys' fees where a fee award statute provides that fees should be awarded "as part of the costs," but not be so read where a fee statute did not apply.

Rejecting that position, this Court held that the word "costs" should be construed uniformly:

> . . . Roadway's statutory construction would create a two-tier system of attorney sanctions. A number of federal statutes permit the award of attorneys' fees. See *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. at 260, n. 33. Under Roadway's view of § 1927, lawyers in cases brought under those statutes would face stiffer penalties for prolonging litigation than would other attorneys. *There is no persuasive justification for subjecting lawyers in different areas of practice to differing sanctions for dilatory conduct. A court's processes may be as abused in a commercial case as in a civil rights action.* Without an express indication of congressional intent, we must hesitate to reach the imaginative outcome urged by Roadway, particularly when a more plausible construction flows from the original enactments in 1813 and 1853.
>
> —447 U.S. at 762-63
> (emphasis added).

This ruling is directly germane here. Federal Rules 54(d) and 68, like § 1927, are meant to be applied uniformly to all civil actions. Like all the Federal Rules, they are expressly intended to "secure the just, speedy, and inexpensive determination of *every* action." Fed. R. Civ. P. 1 (emphasis added). A construction of Rules 54(d) and 68 that would include attorneys' fees as

"costs" where Section 1988 or a similarly-worded fee award statute was involved, but not include them where no such statute was involved, would abrogate the uniform application of Rule 68 to all civil actions. Indeed, the relatively modest impact which Rule 68 has "in a commercial case"—to use the example mentioned by this Court in the passage quoted above—would stand in starkest contrast to the life-or-death effect it could have "in a civil rights case" or certain other fee-award cases. The "imaginative outcome" rejected in *Roadway Express* must likewise be rejected here.

Like the argument rejected in *Roadway Express*, petitioners' (and the Government's) construction of Rule 68 would create a "two-tier system" of cost-shifting. Indeed, closer analysis of the fee award statutes reveals that a *three*-tier system would result: for while cases arising under *some* fee-award statutes would be affected—those which use the phrase "as part of the costs"—cases arising under dozens of other fee award statutes—those which use a different form of words, such as the Real Estate Settlement Procedures Act, 12 U.S.C. § 2607(d)(5)—would not be so affected. See Point I.B., *infra*. Introducing these kinds of "untenable distinctions" into the construction of the Federal Rules of Civil Procedure would violate first principles of statutory construction. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982).

Roadway Express is directly relevant for another reason as well. In that decision, this Court specifically addressed the question whether Section 1988 made any change in the meaning of the word "costs" in § 1927 or in the Congressional policy of uniformity in defining "costs." This Court held that it did not:

> [Petitioner] insists, however, that its recovery should not be restricted to the costs listed in § 1920. It argues that since courts look to § 1920 to determine the costs taxable under § 1927, they should be equally free to define costs according to other statutes that may be involved in a lawsuit. [*Petitioner*] *emphasizes that the civil rights statutes allow the award of attorneys' fees "as part*

of the costs" of the litigation . . . . This superficially appealing argument cannot survive careful consideration.

* * *

[Petitioner] offers no evidence that Congress intended to incorporate those attorneys' fee provisions into § 1927. [Section 1988] makes [no] mention of attorney liability for costs and fees. [*Petitioner*] *identifies nothing in the legislative records of those provisions that suggests that Congress meant to control the conduct of litigation.*

—447 U.S. at 758, 761 (footnote and citations omitted)(emphasis added).

The "superficially appealing argument" from the language of Section 1988 that was rejected in *Roadway Express* likewise "cannot survive careful consideration" in this case. Here, too, petitioners "identify nothing" in the legislative history of Section 1988 indicating that Congress even considered Rule 68 when it included attorneys' fees "as part of the costs" in enacting Section 1988. There is no reference to Rule 68 in the Senate Report on Section 1988, S. Rep. No. 1011, 94th Cong. 2d Sess. (1976), *reprinted in* 1976 U.S. Code Congressional and Administrative News 5908, or the House Report, H.R. Rep. No. 1588, 94th Cong. 2d Sess. (1976). The House Report does not even mention the phrase "attorneys' fee as part of the costs" in its description of the "key features" of Section 1988. H.R. Rep. No. 1588, 94th Cong. 2d Sess. 6 (1976).

The legislative history of Section 1988 indicates that the use of the phrase "attorneys' fee as part of the costs" had nothing to do with Rule 68. Rather, Section 1988 was designed to foster uniformity in the fee award process and to overcome *Alyeska Pipeline Service Co. v. The Wilderness Society*, 421 U.S. 240 (1975), which had precluded an award of attorneys' fees without express Congressional authorization. The specific language which Congress chose therefore "tracked" the explicit fee award provisions already included in Titles II and VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000a-3(b) (Title II), 42

U.S.C. § 2000e-5(k) (Title VII), and § 402 of the 1975 Voting Rights Act amendments, 42 U.S.C. § 1973(e), whose validity this Court had consistently upheld. The House Report states:

> Existing statutes allowing fees in certain civil rights cases [provide for] discretionary awards for any prevailing party. Keeping with that pattern, *section 1988 tracks the language* of the counsel fee provisions of [the statutes cited in text above].

H.R. Rep. No. 1588, 94th Cong. 2d Sess. 5 (1976) (emphasis added). The legislative history of those earlier statutes likewise contains no reference to Rule 68. S. Rep. No. 872, 88th Cong. 2d Sess. (1964), H.R. Rep. No. 914, 88th Cong. 2d Sess. (1964), *reprinted in* 1964 U.S. Code Congressional and Administrative News 2355; S. Rep. No. 295, 94th Cong. 1st Sess. (1975), H.R. Rep. No. 196, 94th Cong. 1st Sess. (1975), *reprinted in* 1975 U.S. Code Congressional and Administrative News 774.

In *Hutto v. Finney*, 437 U.S. 678 (1978), this Court held that Congress described attorneys' fees as "costs" under Section 1988 not for any reason associated with Rule 68, but rather to permit an award of such fees against a state notwithstanding the Eleventh Amendment. This Court stated:

> Just as a federal court may treat a state like any other litigant when it assesses costs, so also may Congress amend its definition of taxable costs and have the amended class of costs apply to the states, as it does to all other litigants, without expressly stating that it intends to abrogate the states' Eleventh Amendment immunity.
>
> —437 U.S. at 696.

Moreover, this Court in *Hutto* attached significance to the phrase "as part of the costs" only after finding clear, affirmative indications in the legislative history of Section 1988 supporting that interpretation. See 437 U.S. at 693-95. However, as set forth above, there is *no* indication in the legislative history that Congress' use of the phrase "as part of the costs" was intended to bring the mandatory "costs"-shifting provisions of Rule 68 into play.

Neither petitioners nor the Government comes to grips with the holding of *Delta Air Lines*, with the inter-relationship between Rules 54(d) and 68, with the *Roadway Express* decision, or with the fact that there is no legislative history to support their argument that Section 1988 was meant to define "costs" in Rule 68. Instead, they argue repeatedly the "policy" contention that their construction would foster "good faith" consideration of "reasonable" settlement offers. *E.g.*, Petitioner's Brief at 24-26; Brief of the United States at 18-19. But these contentions simply ignore that this Court held in *Delta Air Lines* that Rule 68 contains no "reasonableness requirement" and that one should not be read into it. See *Delta Air Lines*, 450 U.S. at 355-56. Such judicial legislation would be equally inappropriate here.

Equally misplaced is the Government's reliance on cases in the lower courts that have apparently held that Section 1988 permits consideration of whether a plaintiff has in bad faith rejected a reasonable settlement offer. *E.g.*, Brief of the United States at 22. The issue of whether Section 1988 permits such consideration in determining a "reasonable" fee is not presented in this case: neither the District Court nor the Court of Appeals ever addressed that question, and no determination has been made that respondent acted in bad faith in rejecting petitioners' offer.[12] The only issue in this case is whether *Rule 68* precludes any consideration of a fee award for services rendered after rejection of an offer, even if that rejection was perfectly justified by the facts at the time. Rule 68 has no such preclusive effect.

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12 The Court of Appeals had remanded the case for determination of a reasonable fee for services rendered after the Rule 68 offer was made, and the circumstances of the settlement offer, and of its rejection, might have been litigated in making that determination. But the petition filed in this Court prevented that determination. There is thus no way to tell from the present record what factors existed at the time the Rule 68 offer was rejected, nor what conditions might have changed from that date to the date of the verdict.

B. The various statutes allowing awards of attorneys' fees were not intended to define "costs" in Rule 68.

Congress did not intend that the various statutes authorizing the award of attorneys' fees would govern the definition of "costs" in Rules 54(d) and 68. As is clear from review of the fee award statutes, which now number over 100, if these statutes (including Section 1988) were used to define "costs" in Rule 68, Congress would have created an inconsistent, irrational scheme based upon "untenable distinctions." Rule 68 must be interpreted to avoid such a result. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982).

Congress has enacted numerous statutes expressly authorizing the award of attorneys' fees.[13] What is especially important here is that some of these statutes define "costs" to include attorneys' fees,[14] while others authorize attorneys' fees in addition to "costs."[15] Even within distinct legislative areas, such as consumer safety and environmental protection, Congress has been inconsistent as to whether attorneys' fees are or are not a part of "costs."[16] Further, some fee award statutes do

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13 There are presently over 100 such fee award statutes. A compilation is found in 3 Derfner & Wolf, *Court Awarded Attorney Fees*, chs. 29-45 (1983). The number of these statutes proliferated after this Court's decision in *Alyeska Pipeline Service Company v. The Wilderness Society*, 421 U.S. 240 (1975), which held that the federal courts could not award attorneys' fees absent express statutory authorization.

14 *See, e.g.*, The Clean Air Act, 42 U.S.C. § 7622(e)(2); Commodity Futures Trading Commission Act of 1974, 7 U.S.C. § 18(f); Agricultural Fair Practices Act of 1967, 7 U.S.C. § 2305(a); and the Bank Holding Company Act Amendments of 1970, 12 U.S.C. § 1975.

15 *See, e.g.*, Fair Labor Standards Act of 1938, 29 U.S.C. § 216(b); The Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2607(d)(2); Equal Credit Opportunity Act, 15 U.S.C. § 1691e(d); National Traffic and Motor Vehicle Safety Act, 15 U.S.C. § 1400(b); National Mobile Home Construction and Safety Standards Act of 1974, 42 U.S.C. § 5412(b); Toxic Substances Control Act, 15 U.S.C. §§ 2618(d), 2619(c)(2), 2620(b)(4)(C).

16 *Compare* the Fair Labor Standards Act of 1938, 29 U.S.C. § 216(b) ("a reasonable attorneys' fee to be paid by the defendant, and costs of the

not use the word "costs" at all;[17] and in at least one instance, a single statute uses both a "costs" and a non-"costs" formulation.[18] Consequently, a senseless scheme would result from attempting to define "costs" in Rule 68 by reference to the various fee award statutes. A few examples make the point.

Two consumer safety statutes, the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. §§ 1901-2012 (the "Motor Vehicle Act"), and the Consumer Product Safety Act, 15 U.S.C. §§ 2051-2083, are similar in purpose and structure. Both authorize the promulgation of safety standards—bumper standards under the Motor Vehicle Act, and consumer product safety standards under the Consumer Product Safety Act. Both were enacted in the same Congressional session. Both expressly authorize private causes of action for violations of the statute. And both contain provisions granting attorneys' fees to prevailing plaintiffs. The Motor Vehicle Act, however, authorizes the recovery of "costs and reasonable attorneys' fees . . ." (15 U.S.C. § 1918(a)) while the Consumer Product Safety Act authorizes the recovery of "the costs of suit, including reasonable attorneys' fees." 15 U.S.C. §§ 2072(a), 2073.

If the fee award statutes were deemed to define "costs" for Rule 68 purposes, a successful plaintiff would, where the requirements of Rule 68 were otherwise met, be barred from recovering attorneys' fees for a defective toaster (under the Consumer Product Safety Act), but not for a defective bumper (under the Motor Vehicle Act). Nothing in the legislative

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action") *with* the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3) ("a sum equal to the aggregate amount of all costs and expenses (including attorneys' fees)"). *Compare also* the Toxic Substances Control Act, 15 U.S.C. § 2619(c)(2) ("costs of suit and reasonable fees for attorneys and expert witnesses") *with* Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(a)(5) ("costs of litigation, including reasonable attorney and expert witness fees").

17 *E.g.*, Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(b)(2).

18 *Compare* Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(b)(2), *with id.*, § 1349(a)(5).

history of either Act indicates a Congressional intent to produce this anomalous result. S. Rep. No. 835, 92d Cong. 2d Sess. (1972), H.R. Rep. No. 1158, 92d Cong. 2d Sess. (1972), *reprinted in* 1972 U.S. Code Congressional and Administrative News 4573, 4596; S. Rep. No. 985, 92d Cong. 2d Sess. (1972), H.R. Rep. No. 1198, 92d Cong. 2d Sess. (1972), *reprinted in* 1972 U.S. Code Congressional and Administrative News 4472.[19]

Moreover, if Rule 68 significance were attached to the phrase "as part of the costs" in Section 1988, the anomalous situations just described would also exist among the civil rights statutes. Thus, while Section 1988 follows some civil rights statutes in including attorneys' fees "as part of the costs," the Fair Housing Act, Title VIII, Civil Rights Act of 1968, 42 U.S.C. § 3612(c), allows the court to award court costs *and* reasonable attorneys' fees to a prevailing plaintiff under certain circumstances. If the variously worded fee award statutes governed the definition of "costs" under Rule 68, a plaintiff who brought a fair housing claim under the Fair Housing Act would not risk his attorneys' fees by the operation of Rule 68,

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19 Likewise, inexplicably inconsistent results would result under the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-2312 and the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692a-1692o. Both Acts protect the consumer from deceptive practices, the former by prescribing standards governing the content and appearance of warranties, the latter by prohibiting abusive, deceptive and unfair debt collection practices. Both also create an express cause of action for injured consumers and grant the courts discretion to award attorneys' fees to a prevailing plaintiff. The Acts differ, however, in their phrasing of this right. The Magnuson-Moss Act allows "costs and expenses (including attorneys' fees)," 15 U.S.C. § 2310(d)(2), while the Fair Debt Collection Act grants a prevailing plaintiff the "costs of the action, together with a reasonable attorneys' fee." 15 U.S.C. § 1682(k)(a)(3). There is nothing in the legislative history to justify the conclusion that Congress intended to preclude a Magnuson-Moss Act plaintiff from an award of fees in the face of a valid Rule 68 offer, but to allow such an award to a Fair Debt Collection Act plaintiff. S. Rep. No. 151, 93d Cong. 1st Sess. (1974), H.R. Rep. No. 1107, 93d Cong. Sess. (1974), *reprinted in* 1974 U.S. Code Congressional and Administrative News 7702; S. Rep. No. 382, 95th Cong. 1st Sess. (1977), H.R. Rep. No. 131, 95th Cong. 1st Sess. (1977), *reprinted in* 1977 U.S. Code Congressional and Administrative News 1695.

while, if he brought the same claim under 42 U.S.C. § 1982, he would run that risk.[20]

The Government points to the existence of fee award statutes in 1938 when Rule 68 was adopted to show that Congress intended the word "costs" in the Rule to be construed according to those statutes. Brief of the United States at 12-13, and Appendix. But the same senseless scheme that would result under different fee award statutes adopted since 1938 would exist under the statutes cited by the Government. For example, the Railway Labor Act of 1926, 45 U.S.C. § 153, and the Fair Labor Standards Act of 1938, 29 U.S.C. § 216,[21] are both designed to protect employees. The Fair Labor Standards Act establishes maximum hour and minimum wage guidelines, whereas the Railway Labor Act creates the National Railway Adjustment Board to mediate disputes between carriers and railroad employees concerning rates of pay, rules, or working conditions. Both Acts expressly authorize private causes of action for violations of the statute. Both Acts also contain provisions granting attorneys' fees to prevailing plaintiffs. But the Fair Labor Standards Act awards prevailing plaintiffs "a reasonable attorney's fee . . . and costs of the action,"

20 42 U.S.C. § 1982 provides: "All citizens of the United States shall have the same right, in every state and territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), this Court noted that while the coverage of Section 1982 differs from that of Title VIII, both Acts prohibit all racial discrimination, private as well as public, in the sale of rental property. As a consequence, litigants can bring housing discrimination suits under both statutes. Giving substance to the otherwise inexplicable differences in phrasing could, in an action which raised claims under both statutes, lead to the result that a plaintiff could be denied post-offer fees if he prevailed under the Section 1982 claim—because fee awards would then be governed by Section 1988—but be awarded fees if he prevailed under the Title VIII claim.

21 The Government indicates that this statute was enacted prior to Rule 68. In fact the statute was enacted on June 25, 1938, whereas Rule 68 became effective in January, 1938. In any event, it is plain that at the time Congress was considering Rule 68, it had before it statutes that were inconsistent concerning whether awards of attorneys' fees were a part of costs.

whereas the Railway Labor Act awards a prevailing plaintiff "a reasonable attorney's fee to be taxed and collected as part of the costs of the suit."

To argue that Rule 68 should be construed by reference to existing fee award statutes is to suggest that Congress intended that a successful Railway Labor Act plaintiff would be barred from recovering his post-offer fees where the requirements of Rule 68 were otherwise met, while a successful Fair Labor Standards Act plaintiff could recover all of his fees. Such a distinction is untenable.

In sum, careful analysis of the fee award statutes shows that, in approving Rule 68, Congress did not intend that the Rule would be construed differently depending on the different language of the different fee award statutes.[22] Certainly it makes more sense to think that Congress intended Rule 68 to be construed by reference to 28 U.S.C. § 1920, thereby producing a consistent and uniform statutory scheme.

C. The recent Advisory Committee proposal to amend Rule 68 confirms that present Rule 68 does not restrict statutory fee awards.

That present Rule 68 does *not* affect the incidence of attorneys' fees is also evident from the recent proposals to amend the Rule advanced by the Committee on Rules of Practice and Procedure. *See* 98 F.R.D. 339, 361-67 (1983). As the Court of Appeals below correctly noted, the very making of those proposals suggests that the Advisory Committee was

22 It is no answer to say, as the Government repeatedly does, that the fee award statutes using the phrase "as part of the costs" are "important," the implication being that the other statutes that do not use the phrase are less "important." *E.g.*, Brief of the United States at 11. The Government suggests no criterion by which the determination of "importance" should or could be made by the District Courts. It bears emphasis that among the statutes that do *not* use the "as part of the costs" formulation are the Fair Labor Standards Act of 1938, 29 U.S.C. § 216(b), and the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1400(b). It would certainly come as a surprise to Congress that the Government is suggesting to this Court that those statutes are in some sense not "important."

at least uncertain that present Rule 68 could properly be construed to produce the result sought by petitioners (and the Government).[23]

Indeed, it is evident from the Advisory Committee's proposals that it did not consider the present Rule well-adapted to fee-shifting. Thus, as noted above, the Advisory Committee was concerned about what it called the "Draconian impact of an 'all-or-nothing' [fee-shifting] rule," *id.* at 365, and therefore would eliminate the mandatory character of the Rule in its present form and give the District Courts discretion not to shift fees. *Id.* at 365-66. The Advisory Committee would also make the Rule apply even-handedly to plaintiffs and defendants alike. *Id.* at 364.

Including attorneys' fees as part of "costs" under the present rule would have the "Draconian impact of an 'all-or-nothing' rule" in cases under those fee award statutes worded like Section 1988. Because present Rule 68 is mandatory—"the plaintiff *must* bear the costs"—a District Court would have no discretion to award the plaintiff any post-offer fees even if the circumstances clearly indicated that plaintiff was not reckless, or even blameworthy, in rejecting the offer.

Moreover, the Advisory Committee proposals would change the present Rule to make it a "two-way street"—defendants who reject settlement offers would be liable to the fee-award

23 After full consideration by the Committee on the Federal Courts, the Association has recommended against the Advisory Committee's proposals, because, among other reasons, the Association believes that the shifting of attorneys' fees to penalize non-settling litigants seems too severe a sanction for failing accurately to predict the outcome of a trial. Moreover, the Association concluded that the proposals would tend unduly to discourage novel theories of law and have an unfair impact on less affluent litigants. The Association also believes that the proposals would foster collateral litigation over the reasonableness of a settlement rejection, which would be undesirable in itself and would almost certainly force the District Courts to inquire into confidential attorney-client discussions.

In light of the Government's decision to participate on the side of petitioners in this case, it should be noted that the Government also opposed the Advisory Committee proposals, for many of the same reasons. *See* Letter of the Acting Deputy Attorney General to the Chairman of the Committee on Rules of Practice and Procedure (February 28, 1984).

sanction as much as non-settling plaintiffs. But the present Rule is a "*one*-way street"—only plaintiffs are at risk. It is inconsistent and unfair, as the Advisory Committee implicitly recognized, to raise the "stakes" by including fees in the "costs" covered by Rule 68 but subject only one party, the plaintiff, to the risk of this sanction. This is, of course, particularly true where only a "sub-class" of plaintiffs—those otherwise entitled to fee awards under particular fee award statutes which are worded to make attorneys' fees "part of the costs"—would be affected.

D. The Rules Enabling Act precludes a construction of Rule 68 that would bar an otherwise appropriate award of attorneys' fees under Section 1988 and similarly worded statutes.

Finally, as the Court of Appeals below properly noted, an interpretation of "costs" in Rule 68 to deny fees which a prevailing civil rights plaintiff would otherwise receive might put Rule 68 beyond the rule-making power granted by the Rules Enabling Act, 28 U.S.C. § 2072. That statute provides in part that the Rules "shall not abridge, enlarge or modify any substantive right."

Rule 68 is procedural in that its aim is to contribute to more efficient litigation; conventionally applied to deny Rule 54(d) "costs" to a prevailing plaintiff, it is sanctioned by the Rules Enabling Act.[24] However, to apply it to preclude a fee award expressly authorized by Congress in legislation adopted under Section 5 of the Fourteenth Amendment would, at the very least, raise a serious question whether it abridged or modified a substantive right. It would be hard to think of a policy area of greater national importance than the civil rights area, and it is well-settled that Congress' powers under Section 5 are the broadest legislative powers it possesses. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455-56 (1976). Accordingly, if the "substantive

24 *See Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941), which has for many years been the leading case on the validity of federal rules under this provision of the Act.

rights" limitation in the Rules Enabling Act has any meaning at all, it must at the least raise a serious question under the Enabling Act if a Rule would be in direct conflict with a Section 5 statute—*i.e.*, foreclosing a Section 1988 fee award that might otherwise be appropriate.[25]

Any construction raising a question of compliance with the Rules Enabling Act should be avoided. Given the absence of a clear indication—or *any* indication—that Congress understood that its Section 5-based statute, and the fee awards which it authorized, would be cut off by Rule 68, the Court of Appeals was correct in holding that Rule 68 should not be construed as petitioners contend.

Point II

THE FUNDAMENTAL CIVIL RIGHTS POLICIES SERVED BY SECTION 1988 WERE NOT INTENDED TO BE OVERRIDDEN BY THE MANDATORY "COSTS"-SHIFTING PROVISION OF RULE 68

The Court of Appeals was also correct that the legislative history of Section 1988, and the policies underlying it, indicate that the phrase "as part of the costs" in Section 1988 was not intended to bring into play the mandatory "costs"-shifting provision of Rule 68. The broad discretion which Section 1988 expressly confers on the District Courts to award a reasonable attorneys' fee "[i]n *any* action or proceeding" was not intended to be ousted by the defendant's conduct in making a settlement offer which proves, in hindsight, to have been more advantageous than the ultimate judgment. The Court of Appeals correctly held that Congress did not intend the fundamental

25 *See* Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. 693, 724-25 (1974): "The most helpful way, it seems to me, of defining a substantive rule—or more particularly a substantive right, which is what the Act refers to—is as *a right granted for one or more nonprocedural reasons, for some purpose or purposes not having to do with the fairness or efficiency of the litigation process*." (Citations omitted; emphasis added.) This, of course, is precisely what Section 1988 is about.

national civil rights policies which Section 1988 fee awards advance to be subjected to the automatic "costs"-shifting effect of Rule 68.

Congress' clear purpose in Section 1988 was to *foster* private civil rights litigation in order to complement Government enforcement. By contrast, Rule 68's purpose is "to encourage settlement of litigation." *Delta Air Lines, Inc.*, 450 U.S. at 352. Thus, Section 1988 and Rule 68 are aimed at different objectives: the former aims at facilitating suit by private plaintiffs in an area of fundamental national policy while the latter raises the stakes for any plaintiff who presses his case, regardless of its nature. Congress deemed Section 1988 "essential" to the enforcement of constitutional rights. S. Rep. No. 1011, 94th Cong. 1st Sess. 2 (1976), *reprinted in* 1976 U.S. Code Congressional and Administrative News 5910. As fully set forth at pp. 13-15 above, the legislative history contains no reference whatever to Rule 68.

This Court has repeatedly recognized that Section 1988 is intended to "ensure effective access to the judicial process." *Hensley v. Eckerhart*, 51 U.S.L.W. 4552 (1983). To the same effect, in *Maine v. Thiboutot*, 448 U.S. 1, 11 (1980), this Court stated that "Congress viewed the fees authorized by § 1988 as 'an integral part of the remedies necessary to obtain' compliance" with the civil rights laws (citing S. Rep. No. 1011, 94th Cong. 2d Sess. 5 (1976)).

Application of Rule 68 as contended for by petitioners would penalize plaintiffs who prevail in protecting their civil rights, simply because the defendant has forced them to a guess as to the amount of his liability and they prove to have guessed incorrectly. Such a penalty is entirely inappropriate in civil rights cases and would frustrate the purpose of Section 1988. As this Court has recognized:

> No matter how honest one's belief that he has been a victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the

> midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.

Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978). Because of the mechanical, mandatory operation of Rule 68, the reading of Rule 68 contended for by petitioners (and the Government) would place in the hands of civil rights defendants, subject to no judicial review, the power to subvert important litigation by making offers which indigent plaintiffs (or their attorneys) might well hesitate to reject.

Recognizing Congress' important goal in fee-award statutes, this Court has declared repeatedly that a prevailing civil rights plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) (awards under Title II of the 1964 Civil Rights Act); *Northcross v. Memphis Board of Education*, 412 U.S. 427 (1974) (the Emergency School Aid Act of 1972); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (Title VII of the 1964 Civil Rights Act); *Hensley v. Eckerhart*, 51 U.S.L.W. 4552 (1983) (Section 1988). Such "special circumstances," which are unusual in successful civil rights suits, can only be determined by the District Courts in reviewing a fee application: but Rule 68, if construed as petitioners (and the Government) read it, would preclude any such judicial determination, just as has happened in this case.

Further, to an unusual degree, the rights of third parties hang in the balance in civil rights cases. As this Court and Congress have agreed, when a civil rights plaintiff prevails, "he does so not only for himself but also as a 'private attorney general' vindicating a policy that Congress considered of highest importance." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. at 402, cited in S. Rep. No. 1011, 94th Cong. 1st Sess. 3 (1976). The application of Rule 68 in the manner contended for by petitioners (and the Government) would separate the named plaintiff's interests from those of other unnamed parties who could benefit from a full prosecution of the case. (It is

noteworthy in this connection that the Advisory Committee's proposals to amend Rule 68, see Point I.C., *supra*, would *not* apply Rule 68 to class or derivative actions, where the rights of absent parties are also in the balance. See 98 F.R.D. 339, 367.)

Moreover, if Rule 68 barred the award of post-offer fees in civil rights cases, it would tend to create a conflict between the interests of the plaintiff's attorney and those of his client. This would be particularly inappropriate in the civil rights context, where as this Court recently affirmed, the need to "attract competent counsel" was one of Congress' concerns in drafting Section 1988. *Blum v. Stenson*, 52 U.S.L.W. 4377 (1984) (citing S. Rep. No. 1011, 94th Cong. 2d Sess. 6 (1976)). The Court of Appeals' decision in this case properly avoids subjecting counsel to the ethical problems that would tend to result.[26]

Finally, the mandatory nature of Rule 68 is fundamentally incompatible with the discretionary nature of Section 1988. As this Court has noted, "the range of discretion of the courts in making [attorneys' fees] awards are matters for Congress to determine [footnote omitted]." *Alyeska Pipeline Co. v. The Wilderness Society*, 421 U.S. 240, 262 (1975). Under Section 1988, that discretion is very broad, as this Court recently stressed in discussing the factors which the District Courts should consider in determining the amount of fee awards. *Hensley v. Eckerhart*, 51 U.S.L.W. 4552 (1983). In the Congressional scheme of broad discretion over fee awards, the automatic, non-discretionary operation of Rule 68 has no place.

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26 The Court of Appeals did not consider these ethical problems particularly serious. *Chesny v. Marek*, 720 F.2d 474, 477-78. However, it is surely anomalous to adopt a reading of Rule 68 which would create *any* ethical problem for lawyers who bring a class of cases which Congress specifically intended to foster and encourage. Moreover, in its Ethics Opinion No. 80-94, this Association concluded that it would be unethical to require a plaintiff's attorney to forgo as part of a settlement a statutorily-authorized fee award. The Association's Ethics Committee reasoned that this would place the attorney in an untenable position, having to bargain over his own fee while bargaining over a settlement for his client. Any interpretation of Rule 68 that allows fees to be precluded would create the same problems.

Conclusion

The judgment and mandate of the Court of Appeals should be affirmed.

Dated: New York, New York
September 11, 1984

Respectfully submitted,

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